GUAN SOON HENG EDIBLE OIL SDN. BHD.

v.

LIAN HUP MANUFACTURING CO. SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
ABU MANSOR ALI J
[CIVIL SUIT NO. 23-1012 OF 1987]
17 NOVEMBER 1988

CIVIL PROCEDURE: *Application for summary judgment - Breach of contract - Claim for damages and interest - No evidence to support triable issues raised by defendant - Leave to defend refused.*

The defendant had agreed with the plaintiff to deliver 200 metric tons of palm oil to Nalin Industries Sdn. Bhd. ("Nalin") in consideration of which the plaintiff would pay to the defendant RM1,150 per metric ton of the same - it was a term that the delivery was to be in the month of December 1983. Prior to the commencement of supply the plaintiff paid the defendant a sum of RM230,000 for the whole 200 metric tons.

By 5 January 1984 there was still no delivery. With Nalin's agreement, time for delivery was extended to 15 January 1984 and then to 22 January 1984. By 23 January 1984 only 92.13 metric tons was delivered which was delivered between 14 January 1984 to 22 January 1984.

The defendant's contentions were that they were not informed of the extension of time granted on 15 January 1984 and that they were prevented from supplying due to *force majeur*.

Held:

[1] There was sufficient evidence to show that the defendant was aware of the extension of time.

[2] There was also sufficient evidence to show that the flood waters had cleared in early January 1984 - therefore the defendant could not rely on *force majeur*.

[3] There were no issues that should be thrashed out at trial.

[4] The order of the Senior Assistant Registrar giving liberty to enter final judgment should remain.

[Appeal dismissed.]

For the appellant/defendant - P.S. Gill (L. Parthiban with him); M/s. L. Parthiban & Associates
For the respondent/plaintiff - M. Pathmanathan; M/s. Yusuf, Lee, Pathma & Marbeck

JUDGMENT

Abu Mansor Ali J:

This is an appeal from the decision of the learned Senior Assistant Registrar granting summary judgment to the respondent (plaintiff) in a claim arising from the appellant's (defendant's) alleged breach of contract for the supply of crude palm oil for:

(a) Liquidated sum of RM124,050.50 being money paid to and retained by the appellant;

(b) damages as a consequence of the breach at RM177,985.50;

(c) interest; and

(d) cost of the present proceedings and proceedings at the High Court Ipoh.

It is common ground that after the judgment and after the execution, the appellant has paid the respondent the sum in para. 1(a) and the interest thereon though the amount remains a matter of dispute. The appeal is only confined to 1(b), (c) and (d).

The facts of the case as found by the learned Senior Assistant Registrar were as follows. The parties herein entered into a "stringing" contract where the respondent contracted with the appellants that for a consideration of RM1,150 per metric ton of palm oil the appellant would deliver 200 metric tons of palm oil to one Nalin Industries Sdn. Bhd. (encl. 11 Exh. YSC1).

It was a term of the contract that the supply and delivery of the consignment was to be in the month of December 1983.

What is not disputed was that the respondent paid RM120,688 to the appellants on 14 December 1983 and a further sum of RM115,000 on 29 December 1983 out of which RM5,688 was for a previous debt and the total of RM230,000 was for the whole consignment of 200 metric tons.

It is also not disputed that by 5 January 1984 nothing was delivered. But prior to that by telex on 30 December 1984 (LKN2 of encl. 38) the appellant admitted having received payments and requested advice since they wish to commence delivery only on 4 or 5 January 1984 because of bad weather conditions.

On receipt of that communication, the respondent referred the matter to Nalin Industries, their buyer, who after some negotiations (encl. 11 Exh. YSC2) agreed to extend the delivery date to 15 January 1984 (encl. 11 Exh. YSC7) and the appellant was duly informed, a fact disputed by the appellant. The date was also further extended to 22 January 1984.

It is not disputed that up to 23 January 1984 the appellant only delivered 92.13 metric tons amounting to RM105,949.50 but failed to deliver the rest. This is the breach the appellant is alleged to have committed for which the Senior Assistant Registrar found the appellant had no defence.

As a consequence of the appellant's alleged breach, the respondent also breached their contract with Nalin Industries (Nalin). Not disputed prior to this, Nalin had filed a suit against the respondent *vide* Ipoh High Court Civil Suit 331 of 1984 wherein judgment was entered against the respondent and the Supreme Court subsequently confirmed that judgment.

The main thrust of the appellant's appeal is that there are triable issues in this case and therefore the learned Senior Assistant Registrar should have given them unconditional leave to defend. Appellant's Counsel says in entering summary judgment, the learned Senior Assistant Registrar had made a wrong decision in law.

The appellant said that the Senior Assistant Registrar's finding that the appellant was aware that the date of delivery had been extended to 15 January 1984 was against the weight of evidence. The appellant urged the Court to bear in mind that between 3 January 1984 to 6 January 1984 the respondent sent a telex to appellant (LKS5 dated 3 January 1984 in encl. 38) asking appellant to withhold delivery pending current negotiation.

The appellant contended that following that postponement of delivery, the only evidence to say that appellant is alleged to have known of the postponement of the delivery date is the affidavit of Lee Kah Hoong affirmed on 28 October 1987 (encl. 33). He is a broker for the supply of palm oil contract between respondent and appellant. According to para. 2 of this

deponent, he is alleged to have told one Liew Quek Heng, a director of the appellant's company, that the date of delivery had been extended and the appellant agreed to effect delivery.

The appellant's Counsel asked the Court to take the evidence in affidavit in encl. 33 with a pinch of salt as there is no mention to what date delivery had been extended. Secondly, if the affidavit of Andy Yeoh Sue Chee (encl. 11), the respondent's financial controller in support of the O. 14 application affirmed on 19 April 1986 is looked at, there has been no mention of Lee Kah Hoong having spoken to the appellant's director. This was the earliest evidence. Also to be noted, appellant's Counsel says, encl. 11 mentioned compromise between respondent, appellant and a third party where the third party agreed to make an advance payment of RM230,000. Appellant says they were not party to this compromise and so called payments were in advance of negotiations and the appellant says if encl. 33 evidence is displaced, appellant's Counsel submitted there is therefore reason to go for trial.

For the respondent however, their Counsel replied that appellant's stated reason that the appellant could not supply palm oil in the original contract date due to bad weather could not be true. Respondent's Counsel referred the Court to the three telexes from the appellant around 30 December 1983 saying they could not deliver on two dates: 20 December 1983 and 27 December 1983. This evidence has to be weighed against the terms as already agreed by the parties. The first cheque (YSC8) attached to encl. 11 was paid on 14 December 1983. It was a contractual term that delivery was to be made in five days on 20 December 1983. Appellant agreed to make delivery. The Court is asked to note that by 19 December 1983 since there was no delivery the appellant was already in breach of the contract. Respondent's Counsel also drew the Court's attention to a letter dated 29 December 1983 (YSC9) attached to encl. 11 enclosing the second payment, the respondent's instruction to the agent was to have the palm oil delivered to the third party, Nalin Industries, as soon as possible. If Nalin Industries' telex to Palm Brokers (YSC4) attached to encl. 11 dated 30 December 1983 is carefully considered, apart from 20 December 1983 to 27 December 1983 when the situation deteriorated, it was apparent that the appellant was delivering palm oil for other people other than respondent from 29 December 1983. Nalin said supply was possible from 29 December 1983. Respondent's Counsel submitted that appellant's Counsel's contention that it was the weather that prevented could not be accepted.

As regards appellant's other defence not to deliver as they were waiting for instructions to deliver, respondent's Counsel's contention was that there was no express instruction to withhold. Counsel urged the Court to look at Exh. YSC6 (Palm broker's telex to Nalin Industries) attached to encl. 11. In actual fact it was more of an objection to the imposition of a penalty of RM150 per metric ton and speaking of the possibility not resolved but hopefully it was going to be resolved on the same day. The matter was resolved as evidenced by YSC7 in requesting the appellant not to deliver as shown in encl. 11, telex from palm broker to respondent and Nalin Industries confirming that the delivery date was then extended to 15 January 1984. It is this extension that appellant says they were not informed. They said this was the triable issue that they want to have ventilated.

I have considered the matter raised by the appellant's Counsel. With respect, I find the contention that they have raised triable issues to have failed. It is within the Senior Assistant Registrar to find whether by the evidence in encl. 33 the respondent had been informed of the extended delivery date to 15 January 1984. The appellate Court should be slow to interfere unless the finding of fact was contrary to law or against the weight of the evidence.

The evidence as found in encl. 33 is the evidence of a common agent employed by both respondent and appellant and in relation to a contract entered by his principals, in its successful completion he has to take interest as his fees depend on that. In YSC7 the common agent, the broker, had successfully negotiated the extension of the delivery date to 15 January 1984. It is certainly going against the grain that he would have kept that information and not inform his other principal, the appellant. Hence the evidence in encl. 33.

In saying that the appellant was not informed of the extended date, what of the conduct of the appellant? Was their conduct consistent with what they say that they stopped delivering as parties were still negotiating and then they read the telex, as they say they read it, that they must withhold delivery? Acting to the contrary they started delivering instead of stopping to the amount of 92 metric tons only. In encl. YSC23 attached to encl. 73A (same as YSC10 attached to encl. 11) is a record of (same as YSC10 attached to encl. 11) is a record of delivery of that 92.130 metric tons commenced from 14 January 1984 to 22 January 1984. I agree with the submission of the Counsel for the respondent that the appellant's conduct is more consistent with the appellant knowing of the delivery date having been so extended but appellant managed to only make delivery up to the quantity. I agree with the finding of fact by the Senior Assistant Registrar that the appellant's conduct to make delivery in the way they did was more consonant with their having been informed to the extended date. I see no useful purpose will be served if these issues were to go for trial.

The appellant also contended that the Senior Assistant Registrar should have held there was a triable issue as the appellant's failure to deliver was not due to *force majeur*. When the respondent was sued by Nalin Industries in the Ipoh High Court the respondent adopted the defence therein that defendant's delivery was affected by adverse weather conditions and could only deliver between 16 January 1984 to 22 January 1984. When respondent was sued by Nalin Industries, the respondent took out third party proceedings against the appellant. Nothing was mentioned about the fact the agent had called and informed the appellant as stated in encl. 33. In respondent's defence in para. 6 of encl. 32, the respondent pleaded that the contract was governed by the domestic sales of contract for Malaysian crude unbleached palm oil in bulk wherein there is provision for *force majeur* clause. If the contract is affected by *force majeur*, appellant's Counsel says delivery can be extended by 60 days notwithstanding expiry of date of delivery. Under the domestic sales contract, if a party is alleging default, then the other party [*sic*] other is entitled to a notice of 48 hours. In the present case, there was no such notice and the respondent failed to fulfil this requirement and there was grave defect.

The respondent contended that the respondent was not blowing hot and cold in respect of their defence in the High Court Ipoh where respondent was sued in respect of breach of contract. In their defence (YSC18 in encl. 32) the respondent was obliged to adopt a posture and put forward all the available defences raised by the appellant. The plaintiff in that Ipoh High Court case took O. 14 Rules of the High Court summons against the respondent and obtained judgment for the respondent's breach of contract. The respondent appealed to the Supreme Court and the Supreme Court affirmed the learned Judge's judgment.

The Court had already concluded that it could not accept that the appellant's reason for non-delivery as due to *force majeur*. As in YSC4 attached to encl. 11 Nalin Industries reported to palm brokers that the flood situation deteriorated from 20 December 1983 to 27 December 1983 and Nalin said appellant was supplying palm oil on account of others from 29 December 1983. The Court also has found that the delivery date had been extended

and since the date had been so extended to 15 January 1984 and the road was clear, the question of invoking *force majeur* provision and all the other provisions of the domestic sales contract as regards notice and the like no longer arise.

Apart from the above, the appellant raised that there was no privity of contract between the 3rd party and appellant. Both directors of appellant denied talking to palm brokers. The respondent's supply of palm oil to the third party was with the concurrence of the appellant. To my mind what was relevant was not whether there was privity of contract between respondent and third party, but the question was whether there was a contract between appellant and respondent and whether the contract had been breached as alleged. As this question has also been answered and there was such breach, the issue of the appellant's contention that there are issues to be thrashed out at the trial on these points must also fail.

The law as regards giving of unconditional leave to defend is clear and the defendant should be allowed to defend if there is a faintest defence. I agree with the Senior Assistant Registrar's finding that the defendant has no defence for the breach to supply in this case. I therefore confirm the order of the learned Senior Assistant Registrar and this appeal is hereby dismissed with costs to be taxed.

Also found at [1989] 2 CLJ 430